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IN THE
COURT OF APPEALS OF INDIANA

ARBIE GARTRELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 15A05-0511-CR-685
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEARBORN SUPERIOR COURT
The Honorable G. Michael Witte, Judge
Cause No. 15D01-0504-FD-121

August 21, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Arbie Gartrell (Gartrell), appeals his sentence imposed after he pled guilty to failure to comply with sex and violent offender registration as a Class D felony, Ind. Code § 5-2-12-9.

We reverse and remand with instructions.

ISSUE

Gartrell raises two issues on appeal, which we consolidate and restate as the following single issue: Whether the trial court properly sentenced Gartrell.

FACTS AND PROCEDURAL HISTORY

Gartrell was convicted of child molest twice, once on December 28, 1984, and again on January 2, 1991. I.C. § 5-2-12-5 defines sex offenders who must register on the Indiana Sex and Violent Offender Registry (the Registry). P.L. 11-1994 required people convicted of specific sex offenses after June 30, 1994 to register. As of July 1, 2001, pursuant to P.L. 238-2001, the June 30, 1994 date was removed from law, requiring some retroactive application. *See* I.C. § 5-2-12-13. Although both of Gartrell's prior convictions were ten years prior to 2001, he was still required to register for life based on his 1984 conviction because the victim was under the age of twelve. *See* I.C. § 5-2-12-13(c).

In April 2003, Gartrell initially registered on the Registry providing 302 ½ Main Street in Aurora as his address. Gartrell was subsequently arrested for public intoxication. While incarcerated his family moved to 444 Park Avenue in Aurora. Gartrell was never advised of his duty to re-register on the Registry upon release from jail

by the jail officials pursuant to I.C. § 5-2-12-7. Upon his release, he did, however, report his new address to his probation officer.

On April 4, 2005, the State filed an Information charging Gartrell with failure to comply with sex and violent offender registration as a Class D felony, I.C. § 5-2-12-9, and violation of probation. On August 30, 2005, Gartrell pled guilty to failing to comply with sex and violent offender registration in exchange for a dismissal of the probation violation; sentencing was left open to the trial court's discretion.

On October 17 and 20, 2005, a sentencing hearing was held. The trial court imposed a three-year sentence to be executed at the Department of Correction, with eighteen months suspended to be served on probation. The trial court recognized Gartrell's prior conviction in Bartholomew County for child molest as the only aggravating factor and found there to be no mitigating factors.

Gartrell now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Gartrell claims he was improperly sentenced. Specifically, he asserts the trial court (1) failed to recognize certain mitigators; and (2) pronounced a sentence that was inappropriate in light of the nature of the offense and character of the offender. As a result, Gartrell contends the trial court erred when it aggravated his sentence.

It is well established that sentencing decisions lie within the discretion of the trial court and will be reversed only for abuse of discretion. *Hayden v. State*, 830 N.E.2d 923, 928 (Ind. Ct. App. 2005), *trans. denied*. When considering the appropriateness of the sentence for the crime committed, courts should initially focus upon the presumptive

penalties.[1] *Rodriguez v. State*, 785 N.E.2d 1169, 1179 (Ind. Ct. App. 2003), *trans. denied*. Trial courts may consider deviation from this presumptive sentence based upon a balancing of the factors considered pursuant to I.C. § 35-38-1-7.1(a), together with any discretionary aggravating and mitigating factors found to exist. *Id*.

Furthermore, when a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are mitigating, and the trial court is not required to explain why it does not find the proffered factors to be mitigating. *Stout v. State*, 843 N.E.2d 707, 710 (Ind. Ct. App. 2005), *trans. denied*. However, when a trial court fails to find a mitigator that the record clearly supports, a reasonable belief arises that the mitigator was improperly overlooked. *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005).

For a trial court to impose a sentence, other than the presumptive, it must (1) identify the significant aggravating and mitigating factors; (2) relate the specific facts and reasons that the trial court found to those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. *Hayden*, 830 N.E.2d at 928. Our supreme court held in *Francis v. State*, 817 N.E.2d 235, 237 (Ind. 2004), that "when a sentence more severe than the presumptive is challenged on appeal, the reviewing court will examine the record to insure that the sentencing court explained its reasons for selecting the sentence it imposed." Furthermore, when an irregularity is

[1] Public Law 71-2005, effective April 25, 2005, abolishing "presumptive sentences" in favor of "advisory sentences" is not applicable to proceedings that commence before April 25, 2005, but conclude after April 25, 2005. *See Patterson v. State*, No. 18A02-0507-CR-651, __ N.E.2d __, n.5 (Ind. Ct. App., May 3, 2006).

found in the sentencing court's decision, the reviewing court may reweigh the proper aggravating and mitigating circumstances. *Id.* at 238. In addition, Indiana Appellate Rule 7(B) gives us authority to review and revise sentences to ensure that they are appropriate in light of the nature of the offense and character of the offender.

Gartrell alleges the trial court abused its discretion when it declined to recognize two mitigating factors. In particular, Gartrell claims the trial court improperly overlooked that he pled guilty and his showing of remorse as mitigating factors. Relying on a long line of precedent, our supreme court recognized that "a defendant who willingly enters a plea of guilty has extended a substantial benefit to the state and deserves to have a substantial benefit extended to him in return." *Francis*, 817 N.E.2d at 237 (Ind. 2004) (quoting Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995)).

Here, as in *Francis*, the trial court did not recognize the defendant's guilty plea as a mitigating factor. *See id*. at 238. Like in *Francis*, the record in the instant case also indicates that Gartrell pled guilty at an early stage. *See id*. We find the fact that Gartrell pled guilty to be of some benefit to the State and thus, a mitigating circumstance entitled to some weight. *See id*. at 238.

Next, Gartrell claims the trial court erred by not recognizing his remorse as a mitigating factor. While Indiana courts have recognized remorse as a valid mitigating factor, recognizing a defendant's remorse as a mitigating factor is within the discretion of the trial court. *See Cotto*, 829 N.E.2d at 526. Thus, the trial court was under no obligation to recognize Gartrell's remorse and we will not second-guess the trial court on

such credibility determinations. *See Wilkie v. State*, 813 N.E.2d 794, 800 (Ind. Ct. App. 2004), *trans. denied*.

In addition, the only aggravating factor recognized by the trial court was Gartrell's prior conviction for child molesting in Bartholomew County.[2] Our supreme court noted in *Morgan v. State*, 829 N.E.2d 12, 16 (Ind. 2005), that:

> We Indiana judges often recite that "a single aggravator is sufficient to support an enhanced sentence." While there are many instances in which a single aggravator is enough, this does not mean that sentencing judges or appellate judges need do no thinking about what weight to give a history of prior convictions. The significance of a criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." *Wooley v. State*, 716 N.E.2d 919, 929 n.4 (Ind. 1999). . . . The need for clarity and careful weighing, made by reference to appropriate prior criminal convictions, is more pronounced than ever given the increased importance prior criminal convictions play in the sentencing process in a post-*Blakely* world.

Here, the trial court recognized only one of Gartrell's prior convictions as an aggravator. We find Gartrell's prior conviction, while it directly relates to the instant charge, is not enough on its own to warrant the maximum sentence. The only recognized aggravating factor is the same conviction that requires Gartrell to register as a sex offender for life. Gartrell's failing to re-register upon being released from incarceration relates tangentially to the child molest conviction in this case. Our review of the record shows that Gartrell was not trying to evade the police as he provided his correct address to his probation officer. He was also not advised of his duty to re-register upon release from jail by

[2] Gartrell's conviction for child molesting was not documented in the Pre-Sentence Investigation Report, but was admitted by Gartrell on the record. (Tr. pp. 18-19).

officials pursuant to I.C. § 5-2-12-7. Thus, we find the trial court abused its discretion when it enhanced Gartrell's sentence based on this sole aggravator.

In light of *Francis*, we do not find it necessary to remand this case to the trial court to balance the aggravators and mitigators. *See Francis*, 817 N.E.2d at 237. We will reweigh the aggravators and mitigators ourselves. We find Gartrell's prior criminal history to be a proper aggravator, and Gartrell's guilty plea to be a proper mitigator. We decline to give Gartrell's guilty plea much weight, as we do not find he proffered any evidence in the record of the benefit his guilty plea produced for the State. As we discussed above, we assign a low weight to Gartrell's criminal history. Thus, the aggravator and mitigator balance one another and we order the presumptive sentence of one and one half years be imposed.

Lastly, Gartrell argues his sentence was inappropriate in light of the nature of the offense and character of the offender. Specifically, Gartrell alleges that there is no indication (1) "the crime he committed was particularly egregious;" or (2) he is among the worst offenders. (App. Br. p. 8).

Indiana Appellate Rule 7(B) gives us the authority to revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *See* Ind. App. R. 7(B). The presumptive sentence is meant to be a starting point for the trial court's consideration in determining an appropriate sentence. *Rodriguez*, 785 N.E.2d at 1179. "To enhance a sentence based on the particular individualized circumstances of the offense, there generally should be some indication that the manner in which the crime

was committed was particularly egregious, beyond what the legislature contemplated when it prescribed the presumptive sentence for that offense." *Pagan v. State*, 809 N.E.2d 915, 927 (Ind. Ct. App. 2004), *trans. denied* (quoting *Jimmerson v. State*, 751 N.E.2d 719, 724 (Ind. Ct. App. 2001)).

Our review of the record indicates the nature of Gartrell's offense is not so egregious as to warrant an enhanced sentence. Upon being released from incarceration, Gartrell reported his address as 444 Park Avenue to his probation officer, but did not update his address on the Registry as required by I.C. § 5-2-12-8. As a result, he was arrested for violating probation and failing to comply with sex and violent offender registration. However, Gartrell was not advised of his duty to re-register upon release by jail officials pursuant to I.C. § 5-2-12-7.

Thus, even though Gartrell pled guilty, due to the contributing circumstances surrounding Gartrell's failure to re-register, we do not find the nature of this offense to be the among the worst of the worst. As the evidence clearly shows, Gartrell was not trying to hide from law enforcement. He provided his probation officer with his correct address and Officer Garland Bridges, a detective with the Dearborn County Sheriff's Department, testified 444 Park Avenue was Gartrell's correct address.

Furthermore, we recognize Gartrell has a criminal history. However, we agree with Gartrell that his criminal history relevant to the instant case (two convictions for child molest fifteen and twenty-two years prior) is so remote, and his remaining criminal history is so dissimilar to the present offense, that his character does not warrant an aggravated sentence either. Thus, we find the trial court's imposition of an aggravated

sentence is inappropriate in light of the nature of the offense and the character of the offender.

CONCLUSION

Based on the foregoing, we reverse the trial court's sentence of three years, with one and a half years suspended, and order the presumptive sentence for a Class D felony, one and one half years, be imposed. Furthermore, we terminate Gartrell's probation and order that he re-register with the Registry at his current address. We remand to the trial court for correction of the sentencing order.

Reversed and remanded with instructions.

DARDEN, J., concurs.

VAIDIK, J., concurs in result without opinion.